

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

IN THE MATTER OF: Case #05-13724-MWV

FOSS MANUFACTURING CO., INC. Manchester, New Hampshire
September 26, 2005

Debtor. 1:10:14 p.m.

**TRANSCRIPT OF PARTIAL TELEPHONIC HEARING ON:
(#5) MOTION BY DEBTOR TO USE CASH COLLATERAL; MOTION FOR ORDERS
AUTORIZING INTERIM USE OF CASH COLLATERAL, GRANTING
REPLACEMENT LIENS, REQUIRING RETURN OF FUNDS FROM DEPOSITORY
ACCOUNTS; SCHEDULING EMERGENCY HEARING ON INTERIM USE OF CASH
COLLATERAL; SCHEDULING FINAL HEARING ON CONTINUED USE OF CASH
COLLATERAL;
BEFORE THE HONORABLE MARK W. VAUGHN, J.U.S.B.C.**

APPEARANCES:

For the Debtor - Proposed: ANDREW Z. SCHWARTZ, ESQ.
KENNETH S. LEONETTI, ESQ.
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For the U.S. Trustee: ERIC K. BRADFORD, AUST
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Electronic Sound Recording Operator: James Palmer

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Co., Life Insurance Company of N.A.:

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For Polyquest, Incorporated:

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For Creditors Patricia C. Foss, Douglas
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For CapitalSource Finance, LLC:

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1 (1:10:14 p.m.)

2 CLERK: All rise. Please be seated. Call the case
3 Foss Manufacturing Company, Inc. This is hearing on the motion
4 for continued use of cash collateral. Parties please state
5 your appearances for the record.

6 MR. SCHWARTZ: Good afternoon, Your Honor. Andrew
7 Schwartz for the debtor.

8 MR. LEONETTI: Kenneth Leonetti, Foley Hoag, also
9 for the debtor.

10 MR. MOORE: Paul Moore for the officers and
11 directors of the debtor, Your Honor.

12 MR. RUSSMAN: David Russman, Your Honor, for
13 Connecticut General Life Insurance and Life Insurance Company
14 of North America.

15 MR. FOSTER: Joseph Foster for Polyquest,
16 Incorporated.

17 MR. SIEGER: Your Honor, John Sieger, Katten/Muchin,
18 out of Chicago, appearing *pro hac vice* in behalf of
19 CapitalSource.

20 MR. POWELL: Charles Powell, Your Honor,
21 CapitalSource Finance, LLC.

22 MR. BRADFORD: Eric Bradford for the U.S. Trustee.

23 THE COURT: Anybody else?

24 MR. ZUMMO: John Zummo, Katten/Muchin, for Foss,
25 (sic) *pro hac vice* -- or not Foss. CapitalSource.

1 THE COURT: Okay. Good afternoon, all of you. All
2 right. I believe the only matter that's on for this morn --
3 this afternoon is the cash collateral. The last hearing we put
4 it off for a week in an interim order, and there was going to
5 be some negotiations. Maybe you can bring me up to date as to
6 where we stand, Mr. Schwartz?

7 MR. SCHWARTZ: Certainly, Your Honor. There have
8 indeed been negotiations and they have been successful. What
9 we're going to propose to you today is that you enter a second
10 interim cash collateral order, one that will run for a span of
11 five weeks and take us up to Halloween, the end of October; and
12 I can summarize for you the key terms of the stipulated order
13 that we've negotiated with CapitalSource and we're prepared to
14 present to you this afternoon.

15 As I've mentioned, this will provide for consensual
16 use of cash collateral for a five-week period. We're going to
17 ask, consistent with the Court's schedule, that we have the
18 final hearing on the use of cash collateral on Monday, October
19 31st, or as soon thereafter as your schedule permits. We will
20 be making a payment to CapitalSource during the course of the
21 five weeks in the aggregate amount of \$251,000. Half of that
22 will be paid on October 1st, the other half on October 15th.
23 That number, the \$251,000, has been derived by reference to the
24 monthly interest under this loan facility at the non-default
25 rate. However, despite its derivation, the cash collateral

1 order is quite explicit that no party is bound by any
2 characterization of the payment, whether it's principal or
3 interest or anything else, is a subject that can be determined
4 later and the rights of all parties and interest are preserved
5 with respect to that.

6 As for replacement liens, we're going to continue
7 with the same program as under the first interim order, and
8 that will provide adequate protection, both to CapitalSource
9 and the PBGC, to the extent either or both of them have an
10 interest to adequately -- adequately protect, also something
11 reserved for another day.

12 One other feature of this second interim order that
13 is new is that the debtor has agreed by October 12th to file a
14 motion for the retention of an investment banker. I think
15 we've all indicated that one of the more likely exit scenarios
16 here is a sale, and to that end the debtor is interested in --
17 in proceeding to get the necessary personnel involved for that
18 process. We're not necessarily committing to sell the
19 business, but we certainly want to explore that. There has
20 already been interest even without an investment banker from
21 certain suitors, and we think there may -- may be quite a few
22 others out there.

23 The cash collateral order also has standard
24 provisions for reporting from the debtor to CapitalSource, for
25 the debtor to respond to inquiries from CapitalSource about

1 business matters, for a weekly meeting between the financial
2 advisors to CapitalSource, and the debtors' operating
3 personnel. And it also provides that CapitalSource can
4 withdraw its consent to the continued use of cash collateral on
5 72 hours' notice, if the debtor is off more than 7.5 per cent
6 on its net cash flow projections on a cumulative basis.

7 If that were to happen, and the -- CapitalSource was
8 to withdraw consent, then there would be an expedited hearing,
9 at which point we could come in and argue for further use of
10 cash collateral under **Dynaco** or any other case law, but we hope
11 we won't end up in that posture. And the early returns, albeit
12 just from one week of operations, are sufficiently encouraging
13 to permit me to say that.

14 So we have a proposed order, it has been vetted with
15 CapitalSource's counsel. Mr. Bradford for the United States
16 Trustee's Office has had a chance to see it, and it may the
17 other parties have comments to make, but at the appropriate
18 time, we'll be prepared to hand it up.

19 THE COURT: All right, thank you.

20 MR. SCHWARTZ: Thank you.

21 THE COURT: All right. CapitalSource, do you want
22 to be heard?

23 MR. SIEGER: Yes, Your Honor, thank you. Again,
24 it's John Sieger. Your Honor, thank you again for allowing me
25 to appear *pro hac vice*.

1 I agree with everything Mr. Schwartz said. We sat
2 here last week, Your Honor, and suggested that the company and
3 CapitalSource intended to have a meeting last week. We did
4 have a meeting, and we think it was a productive meeting. We
5 think there are -- there's at least the prospect of an agreed
6 formulation, a -- a path to work this case through.

7 One piece that's missing, obviously, is the formation
8 of the Creditors' Committee, and we intend to use the time
9 between now and assuming Your Honor approves this cash
10 collateral order, the expiration, this cash collateral order to
11 sit down with the debtor and CapitalSource and the Creditors'
12 Committee, to talk about an even more definitive plan for next
13 -- from this case, but to date, everything has -- has gone as
14 we have hoped it would when we stood before you last week.

15 To that end, Your Honor, the order, should Your Honor
16 choose to enter it today in the -- in the form that we've
17 worked out, would resolve our preliminary objection to the cash
18 collateral motion. We would -- assuming that that order is
19 entered today. We would withdraw that preliminary objection
20 and reserve our rights to object to a final cash collateral
21 order or other order prior to the next hearing, but as we stand
22 here today, we think that the order that's been presented to
23 Your Honor gives everybody an opportunity to sit down and
24 really work this case through and reach an agreed exit to this
25 case.

1 THE COURT: Okay. Thank you. Mr. Bradford?

2 MR. BRADFORD: Thank you, Judge.

3 THE COURT: You have a meeting to set up to form a
4 Committee, is that right?

5 MR. BRADFORD: I do, Your Honor.

6 THE COURT: Okay.

7 MR. BRADFORD: That's scheduled for this Wednesday,
8 the 28th, at four p.m. We're going to be conducting it here in
9 Manchester. We're also going to have telephone conference
10 capacity, so we're going to get that Committee formed as
11 quickly as possible on Wednesday night.

12 As Mr. Schwartz said, I have had an opportunity to
13 review the draft cash collateral order, albeit briefly. A
14 couple of things that I note are not in it, not in it. There's
15 no 506(c) waiver. There's no lien being granted to the bank on
16 any avoidance actions under Section 544, 547, 548, 549, and
17 550. There are no Section 364(c) and (d) type protections
18 accorded to the lender.

19 I don't know if there are going to be actual advances
20 on any line here, but I'm treating this strictly as a cash
21 collateral order, and consistent with that, the debtor and the
22 lender are making reference to the New Hampshire wind-down
23 provision. There is a cash budget, I believe, that was
24 attached to the motion itself that's going to be incorporated
25 by reference in the order.

1 I have asked the parties to consider, consider,
2 during these next several weeks, once the Committee is formed
3 and counsel appointed, carve-outs for the Committee
4 professionals at a minimum, given that it does appear just on a
5 quick look at the debtor's financials that assuming the case
6 did have a 363 motion tee'd up, there would be not only
7 coverage for the lender, but also something left for general
8 unsecured creditors, and I think having Committee professionals
9 given some modest certainty of recovery or covering on their
10 fees, that would be certainly in the Committee's best
11 interests.

12 The only other thing is the debtor is going to be
13 accounting to the lender with actual-to-budget projection
14 trailing information that it is going to be filing with them.
15 I -- I've requested a copy of that. They've agreed to give it
16 to me, but I think it's also important that that document,
17 periodic as it is, I don't know if it's going to be weekly,
18 semi-monthly, monthly, what have you, I think it's important
19 that that get filed with the Court so everyone can vet for
20 themselves the accuracy of the debtor's prognostications versus
21 its actual performance.

22 That would be the only thing that I would request any
23 different than what's in the four corners of the order today.
24 If that can't be done today, then perhaps that can be the
25 subject of the parties' negotiations, but I -- I think at a

1 minimum, the Court needs to see what's going on.

2 So bottom line, the U.S. Trustee has no objection to
3 the draft order as I've understood it and articulated it on the
4 record here today.

5 THE COURT: Okay.

6 MR. SCHWARTZ: If I may, Your Honor, I'd like to
7 speak just to the last point Mr. Bradford made about the filing
8 of the reports that we're going to provide. The draft order
9 does contemplate that if the United States Trustee or the
10 Committee requests the type of information we're going to be
11 providing to CapitalSource, that the debtor will make that
12 information available to the U.S. Trustee or the Committee. I
13 -- I think that's more than sufficient in the circumstance.

14 I have a reluctance to agree to file these documents
15 with the Court. They do reflect information that would not
16 typically be public. I recognize that with the Chapter 11,
17 some of those protections that a private company might normally
18 have have to give way to some extent, but I think we've struck
19 the appropriate balance here by agreeing already without being
20 asked to make the information available to Mr. Bradford's
21 office or to a Committee, and that ought to be more -- more
22 than sufficient to permit the watchdogs who have those
23 functions in a Chapter 11 case to exercise their
24 responsibilities; but just to file it to make the information
25 available to anybody who has access to the court file, I think

1 that's overkill, and we would resist that request.

2 MR. BRADFORD: The only rejoinder that I would have,
3 Your Honor, is it's -- it's Arabic numbers, it's financial
4 information, there's nothing scandalous I don't think in it
5 that would implicate Section 107. So to that extent, I think
6 that it's important that the Court be apprised first and
7 foremost of this financial information. So to the extent that
8 telemetrics are provided to the Committee and the U.S. Trustee,
9 I think that those need to be made available to everyone.

10 THE COURT: Well, I assume by making available to
11 U.S. Trustee, the idea is, that if you see something that you
12 think is out of the ordinary, you'll bring it to the attention
13 of the Court.

14 MR. BRADFORD: Certainly.

15 THE COURT: Isn't that sufficient? Put it on your
16 shoulders, Mr. Bradford.

17 MR. BRADFORD: I'm always of the opinion, Your
18 Honor, that it's better to have complete transparency in a
19 Chapter 11.

20 THE COURT: Well, maybe at the final hearing we'll
21 have complete transparency. For now, it seems to me, I'm going
22 to allow the procedures outlined in the proposed order. You'll
23 get it and you'll have a chance to re -- respond, and the
24 Creditors' Committee, I guess, as soon as they're formed,
25 they'll have a chance also. Given those two entities, it seems

1 to me if something is wrong, it should be brought to my
2 attention.

3 MR. BRADFORD: Very well, Judge. Thank you.

4 THE COURT: Okay. Mr. Foster?

5 MR. FOSTER: Thank you, Your Honor. I've not had a
6 chance to -- to view the order and I just wanted to make sure
7 that on the declaration of a default, because they're off by I
8 guess at 7.5 per cent, who is going to get notice. I assume
9 the 20 largest creditors will notice of the declaration of the
10 default by affidavit or some -- some similar procedure? I just
11 want to confirm that just so that the creditors will know.

12 MR. SCHWARTZ: Just by way of clarification, I would
13 say that it's not a default in the -- in the sense that you
14 might see under -- under a DIP or something like that. The way
15 this order works, CapitalSource would be able to withdraw its
16 consent prospectively, and then the burden would be on
17 CapitalSource to seek an expedited hearing to suspend the use
18 of cash collateral, and I'm sure that in seeking such an
19 expedited hearing, CapitalSource would serve any party in
20 interest who'd filed the notice of appearance, including Mr.
21 Foster, to the extent he's done that or will do it, so that
22 everybody will have notice if there is such a proceeding.

23 THE COURT: Let me -- let me just get that straight
24 then. If -- if that comes about and the 72-hour provision
25 comes into play, at the end of the 72 hours, do you still have

1 the right to use cash collateral?

2 MR. SCHWARTZ: Yes, until such time as that -- that
3 motion is -- is heard by you.

4 THE COURT: Okay.

5 MR. SCHWARTZ: So I think we're covered, and I think
6 all -- all parties in interest, including Mr. Foster's client,
7 would be protected because anyone who is on the notice list
8 electrically or otherwise will -- will know about this in
9 advance. Thank you. May I hand this order up, Your Honor?

10 THE COURT: Yes. Anybody else want to be heard
11 either for or against this continued use?

12 MR. RUSSMAN: Judge, David Russman for Connecticut
13 General Life Insurance.

14 THE COURT: Yes.

15 MR. RUSSMAN: I -- I haven't reviewed the budget,
16 and I just wanted to just put on the record that the -- the
17 monthly premium to my client is approximately \$350,000, and
18 I've been assured that the budget is accounting for that. I
19 also just wanted to say on the record on behalf of the Life
20 Insurance Company of North America, the monthly premium is
21 approximately 12,700, so I -- I've been told that the budget
22 accounts for that as well. Thank you, Judge.

23 THE COURT: You're welcome. Well, the budget
24 provides for what, 125,000, 150, 135, 135, on a weekly basis, I
25 assume that that's sufficient to cover --

1 MR. LEONETTI: That's correct, Your Honor, the
2 budget does include those numbers.

3 MR. RUSSMAN: Correct.

4 MR. LEONETTI: Thank you, Judge.

5 THE COURT: Okay. All right. The order.

6 MR. SCHWARTZ: May I hand it up, Your Honor?

7 THE COURT: Yes. Has this been filed electronically
8 yet?

9 MR. SCHWARTZ: No, it has not. We just worked it
10 out with the final details a few moments ago.

11 THE COURT: Okay.

12 MR. SCHWARTZ: And I believe that's the only copy
13 that exists in its final form. (Pause) Mr. Sieger has reminded
14 me, there are -- there is at least one blank in the -- in the
15 proposed order, Your Honor, concerning the hearing date and any
16 associated objection deadline. Again, we're asking for October
17 31st, if that works for the Court. We understand it may not.

18 THE COURT: When do I go away?

19 CLERK: Tuesday afternoon.

20 THE COURT: Oh.

21 CLERK: So the afternoon (unclear) on the 31st,
22 morning.

23 THE COURT: Okay. I guess we can do it at ten
24 o'clock on the 31st.

25 CLERK: No, the afternoon.

1 THE COURT: Oh, the afternoon? One o'clock?

2 CLERK: (unclear)

3 THE COURT: I guess we could do it at one -- one
4 o'clock on the 31st.

5 MR. SCHWARTZ: That would be ideal. Thank you very
6 much for that, Your Honor.

7 THE COURT: The only caveat is I -- the National
8 Conference of Bankruptcy Judges starts -- I leave on Tuesday
9 for that. So to the extent there was any extension of the
10 hearing, it would be a limited amount of time.

11 (Pause)

12 MR. SCHWARTZ: It appears that sometime between the
13 25th and the 27th would be the consensus view on an objection
14 deadline, Your Honor.

15 THE COURT: Is there a deadline -- I haven't got
16 there yet.

17 MR. SIEGER: You want it earlier, the 25th?

18 THE COURT: Is there an objection deadline in here?
19 Oh --

20 MR. SCHWARTZ: It is a -- there's a -- right --
21 there's a second blank toward the end --

22 THE COURT: Okay.

23 MR. SCHWARTZ: -- last paragraph. Generally
24 speaking, sooner rather than later is better. It would give us
25 and you time to study any objections, so I would say no later

1 than the 26th.

2 MR. SIEGER: The 26th is fine by CapitalSource, Your
3 Honor, that's one of the creditors here.

4 (Pause)

5 THE COURT: All right. I've read it. It appears to
6 be more reasonable than some cash collateral orders I've seen.
7 Actually, it's very reasonable. I have one question. This 7.5
8 per cent which is related to net cash flow, are the parties in
9 agreement as to why -- where they look to see what the net cash
10 flow is? I mean, is that --

11 MR. SIEGER: Your Honor, I believe we made a change,
12 but hopefully, it's -- it's embodied in the order. The
13 reference is the defined term in the budget, it's called,
14 quote --

15 THE COURT: Cumulative cash.

16 MR. SIEGER: -- "cumulative cash," Your Honor. That
17 is a defined line item in the budget that was submitted
18 attached to the motion. We actually made that change to
19 reference exactly the point that you're raising now.

20 THE COURT: Okay.

21 MR. SIEGER: And that is just a line item that reads
22 right across. It's got a number and they have to be at 92.5
23 per cent of that number at any particular point in time, and if
24 they are, sounds like they're well ahead of the game right now,
25 then we keep on going.

1 THE COURT: All right.

2 MR. SIEGER: But there is -- there is a definitive
3 benchmark, yes.

4 THE COURT: Okay. All right. Everybody's in
5 agreement that's what it is, cumulative cash?

6 MR. SCHWARTZ: Yes.

7 THE COURT: Okay. Why don't I give this back to
8 you. If you'll submit this in electronic form with the
9 modifications, I'll sign it.

10 MR. SCHWARTZ: All right. And did you have an
11 object --

12 THE COURT: Pardon.

13 CLERK: Objection deadline.

14 THE COURT: All right. The objection deadline will
15 be the 26th --

16 MR. SCHWARTZ: Okay.

17 THE COURT: -- at four p.m., I believe it says in
18 the order.

19 MR. SCHWARTZ: All right.

20 THE COURT: And the hearing will be on the 1st at
21 one -- one p.m.?

22 CLERK: 31st.

23 THE COURT: 31st at one p.m. Okay. And I guess
24 that takes care of it. Anything else?

25 MR. SCHWARTZ: I don't think so, Your Honor.

1 THE COURT: Mr. Russman, I did approve your *pro hac*
2 *vice*, I don't know if you know that.

3 MR. RUSSMAN: Thank you, Judge, I appreciate that.

4 THE COURT: Okay. Anybody else want to be heard?
5 All right. Hearing nothing, we will adjourn. Thank you

6 MR. SCHWARTZ: Thank you, Your Honor.

7 MR. RUSSMAN: Thank you, Your Honor.

8 MR. SIEGER: Thank you, Your Honor.

9 (End at 1:32:45 p.m.)

10 * * * * *

11 I certify that the foregoing is a true and accurate
12 transcript from the electronically sound recorded record of the
13 proceedings.

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Date